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In The Supreme Court of The United States

October Term, 1967

MONTE VISTA LODGE,

Petitioner,

vs.

GUARDIAN LIFE INSURANCE COMPANY OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner, Monte Vista Lodge, a California corporation, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit filed thereon on September 20, 1967, a rehearing in which was denied by that court on November 28, 1967.

CITATION TO OPINION BELOW

The United States District Court for the Southern District of California (then, the Southern Division of the Southern District of California) from which the appeal to the United States Court of Appeals for the Ninth Circuit was taken, issued no opinion. The opinion of the United States Court of Appeals for the Ninth Circuit is not yet officially reported. It appears unofficially at CCH Bankruptcy, para. 22,382. The judgment is contained in the last sentence of the opinion.

JURISDICTION

The jurisdiction of the United States Supreme Court is invoked on the ground that the interpretation and application of a Federal statute is involved, namely, the Bankruptcy Act, and, more specifically, § 263 thereof.

The order from which the appeal was taken to the United States Court of Appeals for the Ninth Circuit was entered June 22, 1966, in proceeding No. 20 674-SD-Bankruptcy, in the United States District Court for the Southern District of California (then, the Southern Division of said Southern District), Judge Fred Kunzel presiding.

The opinion and judgment of the United States Court of Appeals for the Ninth Circuit dated September 20, 1967, referred to above, is reproduced in "Appendix A" to the petition.

There has been no order granting an extension of time within which to petition for a Writ of Certiorari.

This Court has jurisdiction under United States Code, Title 28, § 1254(1), and Article III, § 2 of the United States Constitution.

QUESTION PRESENTED

Whether or not it was error to conclude that the United States District Court had no jurisdiction (under Chapter X or any other portion of the Bankruptcy Act or the bankruptcy court's inherent equitable powers) to even temporarily restrain the respondent from foreclosing its deed of trust upon the property of petitioner.

STATUTORY PROVISIONS INVOLVED

Bankruptcy Act, § 263 (11 U. S. C. A. § 663), which provides:

> "Nothing contained in this chapter shall be deemed to affect or apply to the creditors of any corporation under a mortgage insured pursuant to the National Housing Act and Acts amendatory thereof and supplementary thereto."

Bankruptcy Act, § 2a(15) (11 U. S. C. A. § 11a(15)), which, in relevant part, provides:

> "Creation of Courts of Bankruptcy and Their Jurisdiction a. The courts of the United States hereinabove defined as courts of bankruptcy are hereby created courts of

> bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to--. . .
>
> "(15) Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act: Provided, however, That an injunction to restrain a court may be issued by the judge only;. . . ."

Bankruptcy Act, § 116(4) (11 U. S. C. A. § 516(4)), which, in relevant part, provides:

> "Upon the approval of a petition, the judge may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon him and the court--. . .
>
> "(4) in addition to the relief provided by section 11 of this Act, enjoin or stay until final decree the commencement or continuation of a suit against the debtor or its trustee or any act or proceeding to enforce a lien upon the property of the debtor. . . . . ."

STATEMENT OF THE CASE

Petitioner borrowed money from respondent, securing the obligation by a deed of trust upon petitioner's property. A portion, and perhaps all, of the obligation was insured by the Federal Housing Agency under § 231 of the National Housing Act (12 U. S. C. A. § 1715v). Petitioner's property is a housing development for the elderly.

Problems and disputes between petitioner, respondent and the building contractor developed during the construction period, and they have not yet been resolved. Petitioner contends that aspects of these disputes are relevant here, but the position taken by the District Court precluded presentation of evidence concerning these facts.

The scheduled date to make installment payments pursuant to the terms of the promissory note arrived, but the payments were not made. If permitted, petitioner would present evidence showing that petitioner, as a result of the problems and disputes mentioned above, should be excused from making at least some of the payments, and/or that petitioner is justified in postponing the making of at least some of the payments.

Respondent commenced foreclosure of its deed of trust but, prior to the date of the foreclosure sale by the indenture trustee, petitioner instituted this proceeding under Chapter X of the Bankruptcy Act. The United States District Court approved the petition and issued its order restraining the foreclosure. Respondent's motion pursuant to Rule 52(b) of the Federal Rules of Civil Procedure resulted in the order from which the appeal

was taken to the United States Court of Appeals for the Ninth Circuit, which order, in effect, dissolved the restraining order against the foreclosure.

The substantive questions about which this case revolves concern the interpretation of § 263 of the Bankruptcy Act. The courts below have apparently concluded that the District Court was pre-empted from exercising any jurisdiction whatsoever over the respondent because respondent's deed of trust is apparently insured by the Federal Housing Agency, a creation of the National Housing Act. Petitioner has contended that the courts below have improperly interpreted § 263, giving it a too-literal, unnecessary and anachronistic interpretation, and one which is not in accord with the general principal of the Bankruptcy Act. Moreover, petitioner has contended that the courts below have jurisdiction over the respondent in a Chapter X proceeding, at least for the purpose of continuing in effect a temporary restraining order against the foreclosure of the deed of trust, by virtue of the inherent equitable powers of the court and its broad powers under § 2a(15) of the Bankruptcy Act.

REASONS FOR GRANTING WRIT

1. This is a case of first impression. There are no reported decisions concerning the issue presented here or concerning or interpreting § 263 of the Bankruptcy Act.

2. More and more, loans for residential home purchase and loans for the construction of special projects involving low-rent housing, homes for the elderly,

etc., are being insured by the Federal Housing Agency. Therefore, the question presented here is of wide significance not only to a great number of individual citizens, but also to a large number of business organizations, lending institutions and, perhaps most importantly, the Federal Housing Agency. Moreover, many such individual loans are of large amounts, and, during the course of any one year, amount to billions of dollars in the aggregate. Therefore, it is of widespread public importance that this issue be resolved.

3. The result of the decisions below creates something of an anomaly in the entire Bankruptcy Act. Chapters X and XII of the Bankruptcy Act are intended and designed to result in plans of arrangement where secured indebtedness will be modified (§§ 216 and 461, Bankruptcy Act). Such proceedings are in contradistinction to "straight bankruptcy" proceedings and to those under Chapter XI of the Bankruptcy Act, where secured indebtedness cannot be modified.

However, the courts have on many occasions restrained the foreclosing of secured indebtedness in straight bankruptcy and Chapter XI proceedings (Lockhart vs. Garden City Bank & Trust Company, 116 Fed. 658 (1940); In re Gunder, 88 Fed. 2d 284 (1937)). Since the chapters dealing with straight bankruptcy and Chapter XI do not contain any provision comparable to § 263, there would appear to be no bar to restraining the foreclosure of an FHA-insured mortgage if the situation arose under a straight bankruptcy or Chapter XI proceeding--even though such proceedings are designed to affect unsecured indebtedness and contain provisions precluding the alteration or modification of secured

indebtedness. Perversely, where in Chapter X and XII proceedings secured indebtedness is to be modified and affected, the courts would now appear to be helpless in restraining the foreclosure of an FHA-insured mortgage. Thus, where the courts and the debtors need the widest power and relief, it is circumscribed and, where there is little justifiable reason to have broad powers of restraint, such are available.

Not only is such a situation impractical, and results in the Bankruptcy Act having self-defeating features, but the problem can easily result in disturbing the administration of the Bankruptcy Act. It can easily result in an attempt to file proceedings under chapters not truly designed for the real needs of the debtor. A person in the petitioner's position could now, for instance, or could have initially, filed the proceeding under Chapter XI and have obtained the needed restraining order. The restraint would be justified in order to carry out and perform a plan of arrangement under Chapter XI. And, paradoxically, the respondent would not have had the voting power under Chapter XI which it does have under Chapter X. Further conflict is created by the judgment below. The bankruptcy court has the obligation, once a proceeding has commenced, to maintain the status quo pending the investigation and determination of certain facts and the conclusion of the first meeting of creditors. In the case of a chapter proceeding, all of the assets should be preserved and held under the aegis of the court pending the confirmation of a plan of arrangement so that in the event of a lack of confirmation of the plan, the assets may be administered under a straight bankruptcy proceeding (In re Swan-Finch Oil Corp. (D. C. N. Y. 1963) CCH para. 60, 837; Collier on Bankruptcy, 14th

Edition, Vol. 1, para. 2.61). The effect of the judgment appealed from is to prevent the court from maintaining the status quo during such a period of time. If respondent is allowed to complete its foreclosure while the Chapter X proceeding continues, and an adjudication of the debtor as a bankrupt results, there will be barely any assets at all to which the creditors may look, the primary asset of the bankrupt having been abandoned without an attempt to secure for the creditors some value from the bankrupt's equity in the property.

Petitioner is informed that the issue presented to the Court has been, just recently, the subject of concern and study by the Senate Judiciary Committee as well as the National Bankruptcy Conference and especially its Reorganization and Arrangement Committee. Petitioner is informed that this case has been widely discussed by bankruptcy practitioners and other experts in the field, and the decision of the courts below have been of worry and concern to them. It is reported to petitioner that the Federal Housing Agency is also studying the problem.

4. The courts below have placed an unreasonably literal and strict interpretation upon some of the words in § 263, contrary to the policy of the Bankruptcy Act to seek to rehabilitate financially embarrassed debtors (Collier on Bankruptcy, 14th Edition, vol 6, para. 0.01). Reasonable, alternative interpretations exist. First, the limited reference in § 263 to the provisions ". . .in this chapter. . ." can be interpreted to mean that the only restructions upon the court are those where the court must look solely for its authority or power to Chapter X, and where it cannot find any power or authority in some other portion of the Bankruptcy Act. Second,

the language "affect or apply to" in § 263 can be interpreted to mean that the plan of arrangement, itself, cannot modify or alter a debt of an FHA-insured lender. Support for this position is found in the case of Central States Life Insurance Co. vs. Koplar, 85 Fed. 2d 181 (1936), where the court states that inasmuch as the proposed plan did not disturb the secured creditors' security, and since the value of the security was greater than the amount of the secured indebtedness, the mortgagee was not a creditor whose interests were materially or adversely affected by the proposed plan, and in the Nordseth decision, 79 Fed. 2d 645 (1935), where the court states, at pp. 645-646:

> "Paragraph (i) of § 74 (11 U. S. C. A. 202(i)) implied that a creditor is not affected if the extension does not reduce the claim or impair the lien, even though it affects the time and method of liquidation. "

The exhibits to the original petition under Chapter X in this proceeding reflect that the value of the property is in excess of the secured indebtedness owed against it (Tr. of R., pp. 7-18). The petition itself contains a verified allegation that "The asset value as shown on Exhibit A generally represents the book or cost value of petitioner's assets, and is thus misleading and not reflective of the true value. A complete, professional, market value appraisal has been made of petitioner's business assets, which appraisal concludes that the market value of such is $5, 600, 000. 00" (Tr. of R., p. 3, lines 13-18). Either one of the above two constructions would permit a temporary restraining order against foreclosure of respondent's trust deed. Authority for

broad, injunctive powers of the courts of bankruptcy finds legislative sanction in § 2a(15), and in the broad, equitable powers of the court extending beyond the scope of the Bankruptcy Act. The court is not dependent upon Chapter X itself for this power (Collier on Bankruptcy, 14th Edition, vol. 1, para. 2.61). Such an injunction need not be part of the plan of arrangement. It would be merely for the purpose of preserving for the benefit of the debtor and the other creditors the substantial equity in the property which is in the custody of the court while the plan was being investigated, formulated and considered.

CONCLUSION

This petition should be granted because § 263 of the Bankruptcy Act has never been judicially interpreted. It is by itself of great significance to a wide spectrum of persons and organizations, and the erroneous interpretation of the courts below will result in creating an anomaly within the Bankruptcy Act and a disturbance of the orderly administration of bankruptcy proceedings.

Petitioner prays that this Honorable Court grant the Writ of Certiorari.

Respectfully submitted,

/s/ JOSEPH J. FISCH

Attorney for Petitioner,
MONTE VISTA LODGE

KENNETH BARWICK

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MONTE VISTA LODGE, *Appellant,* vs. THE GUARDIAN LIFE INSURANCE CO. OF AMERICA, *Appellee.*	No. 21,303

[September 20, 1967]

Appeal from the United States District Court
for the Southern District of California
Southern Division, (now the Southern
District of California)

Before: BARNES and DUNIWAY, Circuit Judges, and FERGUSON,* District Judge

FERGUSON, District Judge:

This appeal is from an order of the district court rendered in a Chapter X proceeding of the Bankruptcy Act. Jurisdiction of the district court over such proceeding is granted by Section 2 of the Act (11 U.S.C. §11), and this court has jurisdiction pursuant to Section 24 (11 U.S.C. §47).

Prior to May 1, 1963, the parties entered into negotiations for a loan to be used by Monte Vista Lodge, a California corporation, for the construction of a housing facility for the elderly. On that date Guardian Life Insurance Company of America

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*Hon. Warren J. Ferguson, United States District Judge, Los Angeles, California, sitting by designation.

secured a commitment for loan insurance from the Federal Housing Administration pursuant to Section 231 of the National Housing Act (12 U.S.C. §1715v). On July 1, 1963, Monte Vista executed a promissory note secured by a deed of trust in favor of Guardian Life. Thereafter, Guardian Life made various advances of funds to Monte Vista, each advance being made by reason of a certificate of mortgage insurance issued by the Federal Housing Administration.

The first payment under the note was due December 1, 1964. However, Monte Vista has never made any payment. Guardian Life obtained permission from the Federal Housing Administration to expend funds pursuant to the deed of trust in order to complete construction, and the Federal Housing Administration agreed to insure the funds so expended. Construction was completed and on February 3, 1966, Guardian Life brought suit against Monte Vista in the state courts to foreclose its deed of trust.

On March 14, 1966, Monte Vista filed in the district court its petition to institute proceedings under Chapter X of the Bankruptcy Act (Corporate Reorganizations). The next day the court approved the petition and appointed the trustee. It also enjoined, ex parte, the foreclosure by Guardian Life of the deed of trust.

Guardian Life, on March 25, 1967, filed a motion to amend the order on the ground that the district court did not have jurisdiction to enter the order enjoining the foreclosure. Thereafter, the court amended its order, lifted the restraining order against foreclosure and declared that the proceedings shall neither apply to nor affect Guardian Life.

Monte Vista appeals from that amendment to the order.

The issue is whether or not the district court correctly concluded that pursuant to Chapter X, Section 263 of the Bankruptcy Act, it had no jurisdiction in a Chapter X proceeding to make an order that would affect or apply to Guardian Life under its deed of trust insured by the Federal Housing Authority under Section 231 of the National Housing Act.

We hold that the district court properly concluded that it did not have jurisdiction.

The Guardian Life Insurance Co. of America

Section 263 (11 U.S.C. §663) provides as follows:

> "Nothing contained in this chapter shall be deemed to affect or apply to the creditors of any corporation under a mortgage insured pursuant to the National Housing Act and acts amendatory thereof and supplementary thereto."

The thrust of appellant's contentions is that the words "affect or apply to" should be interpreted to mean that although the plan of arrangement under Chapter X cannot modify or alter a debt of a Federal Housing Authority lender, it does not prohibit an injunction while the plan was being implemented. Simply stated, Monte Vista claims that the section should be interpreted to permit the postponing of as opposed to the preventing of foreclosures.

However, Section 263 is not ambiguous as appellant contends, and it is susceptible only to the meaning of its clear language. It states plainly that a creditor which has loaned funds to a debtor corporation and has received a mortgage evidencing such obligation insured under the provisions of the National Housing Act shall not be affected by any of the provisions of Chapter X of the Bankruptcy Act nor shall any of the provisions of Chapter X apply to such creditor.

The language of a statute is the best and most reliable index of its meaning, and where language is clear and unequivocal it is determinative of its construction. *Department Employees' Local 1265, AFL-CIO v. Brown,* 284 F.2d 619 (9th Cir. 1960); *N.L.R.B. v. Lewis,* 249 F.2d 832 (9th Cir. 1957), *aff'd,* 357 U.S. 10.

The legislative history of Section 263 reveals the reason why Congress has created the exception. Section 77B, which was the predecessor of Chapter X, became effective on June 7, 1934. The National Housing Act became effective on June 27, 1934. The predecessor of Section 263 was Section 77B(n), adopted on August 19, 1935, one session of Congress after the adoption of Section 77B, as an amendment to Section 77B. It is clear from this chronology that Congress, although it adopted the policy of promoting debtor rehabilitation through corporate reorganizations, chose to create an exception to this policy and to promote the interests of creditors with mortgages insured under the Na-

tional Housing Act. It created the exception with the intent of furthering the public policy embodied in the National Housing Act by promoting low-cost housing. (See 38 Ops. Att'y Gen. 258 (1935).)

Congress desired to implement this policy by encouraging private lenders to enter into mortgages insured under the National Housing Act. One of the major inducements was to exempt these mortgagees from the provisions of Section 77B, thereby allowing them to foreclose their defaulted mortgages without hindrance or delay. It realized that debtors would attempt to prevent foreclosure proceedings by utilizing Section 77B proceedings, and it was that attempt which Congress desired to prevent. (H.R. Rep. No. 1644, 74th Cong., 1st Sess. (1935) and *Hearings on S. 3058 Before a Subcommittee of the Senate Committee on the Judiciary,* 74th Cong., 1st Sess. (1935).)

Appellant concedes that in 1935 the exemption contained in Section 263 was desirable, but claims that today it has lost its validity. Such an argument is one which can be addressed properly only to Congress. In any event, the passage of time cannot change clear and unequivocal language of a statute.

Monte Vista contends in the alternative that the restraining order which was issued upon the filing of the Chapter X petition arose not as the result of anything contained in Chapter X but as the result of the inherent equity power of a bankruptcy court or as the result of Section 2(a)(15) of the Bankruptcy Act (11 U.S.C. § 11(a)(15)) which provides that bankruptcy courts may make such orders in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of the Act.

However, neither the inherent equity powers of the Court nor Section 2(a)(15) can permit a bankruptcy court to act beyond its primary jurisdiction. Section 263 eliminates the property described from the authority of the bankruptcy court in a Chapter X proceeding, and it therefore has no power to protect nonexistent jurisdiction.

It is further claimed that Chapter X, Section 102 (11 U.S.C. § 502), which provides in part as follows:

> "The provisions of chapter 1 through 7, inclusive of this title shall, insofar as they are not inconsistent [with] or in

conflict with the provisions of this chapter, apply in proceedings under this chapter. . . ."

brings into operation Section 2(a)(15) which is within Chapter I and which permits stay of foreclosure actions. This proposition is sound except as it applies to Guardian Life as a creditor under a mortgage insured pursuant to the National Housing Act. Section 2(a)(15) is an omnibus provision, phrased in general terms to provide the basis for a broad exercise of power in the due administration of a bankruptcy proceeding. In contrast, Section 263 is a very narrow and specific exception to the exercise of the court's jurisdiction. Under the specific terms of Section 102, if Section 2(a)(15) is in conflict with Section 263, then the conflict must be resolved in favor of Section 263. Fundamental maxims of statutory construction require that a specific section be found to qualify a general section. A specific statutory provision will govern even though general provisions, if standing alone, would include the same subject. *Karrell v. United States,* 181 F.2d 981 (9th Cir. 1950), *cert. denied,* 340 U.S. 891.

The result argued for by appellant would be particularly anomalous in light of Section 113 (11 U.S.C. §513), which is a part of Chapter X. Section 113 expressly grants the power in a Chapter X proceeding to issue a temporary stay of a mortgage foreclosure, thus making it unnecessary to invoke Section 2(a)(15) in such cases. Section 263 expressly provides that nothing in Chapter X, which must also mean nothing in Section 113, shall be deemed to apply to or affect creditors under a mortgage insured under the National Housing Act. Congress could hardly have intended to grant the power to enjoin mortgage foreclosures in Chapter X proceedings by Section 113, except certain mortgages from this power by Section 263, and then nullify the exception by a general reference, in Section 102, to Section 2(a)(15).

Lastly, Monte Vista claims procedural error in the motion to vacate the restraining order. Guardian Life, in its moving papers, labeled its motion as one made pursuant to Rules 52(b) and 59(e) of the Federal Rules of Civil Procedure. Rule 52(b) provides in part:

"Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings

or make additional findings and may amend the judgment accordingly."

Rule 59(e) provides in part:

"A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

Without deciding that issue of whether or not the motion technically came within the two rules, a party should not be bound at his peril to give the proper nomenclature for his motion. This would be a retreat to the strict common law. So long as he makes a timely motion and states the grounds therefor, the court should grant relief appropriate thereto. (6A Moore, Federal Practice §59.12, at 3877-78 (2d ed. 1953).) A district court sitting as a court of bankruptcy has power in the first instance to determine whether it has jurisdiction to proceed (1 Collier, Bankruptcy §2.05 (14th ed. 1967)), and, therefore, it has coextensive power to correct its erroneous assertion of jurisdiction.

The order appealed from is affirmed.